

1 COOLEY LLP
JOHN C. DWYER (136533) (dwyerjc@cooley.com)
2 3175 Hanover Street
Palo Alto, CA 94304-1130
3 Telephone: (650) 843-5000
Facsimile: (650) 849-7400
4

AARTI REDDY (274889) (areddy@cooley.com)
5 REECE TREVOR (316685) (rtrevor@cooley.com)
101 California Street, 5th Floor
6 San Francisco, CA 94111-5800
Telephone: (415) 693-2000
7 Facsimile: (415) 693-2222

8 Attorneys for Defendants
TESLA, INC. and ELON MUSK
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 AARON GREENSPAN,

15 Plaintiff,

16 v.

17 OMAR QAZI, SMICK ENTERPRISES, INC.,
ELON MUSK, and TESLA, INC.,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

Case No. 3:20-cv-03426-JD

**TESLA DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE AND CONSIDERATION OF
DOCUMENTS INCORPORATED BY
REFERENCE IN SUPPORT OF TESLA
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S THIRD SUPPLEMENTAL &
AMENDED COMPLAINT**

Trial Date: None Set
Date Action Filed: May 20, 2020

Pursuant to Federal Rule of Evidence 201, Defendants Tesla, Inc. and Elon Musk (collectively, “Tesla Defendants”) respectfully request that this Court incorporate by reference and/or take judicial notice of the documents identified below in support of the Tesla Defendants’ Motion to Dismiss Plaintiff’s Third Supplemental and Amended Complaint (“Motion”). All of the documents identified in this Request are attached to the supporting Declaration of Aarti Reddy (“Reddy Decl.”), filed concurrently herewith.

I. DOCUMENTS SUBJECT TO THIS REQUEST

Exhibit	Description	Basis for Notice and/or Incorporation¹
1	Aaron Greenspan, “Reality Check,” Plainsite.org (January 7, 2020)	Publicly available from a reliable source
2	Tweet from @PlainSite dated August 10, 2018	Publicly available from a reliable source
3	Tweet from @PlainSite dated August 24, 2018	Publicly available from a reliable source
4	Tweet from @PlainSite dated March 19, 2019	Publicly available from a reliable source
5	Email from Aaron Greenspan to Elon Musk (Aug. 7, 2019) (posted to Plainsite.org on Aug. 8, 2019)	Publicly available from a reliable source
6	Transcript of Tesla, Inc.’s Analyst/Investor Day on April 22, 2019	¶ 271 Issue No. 23; publicly available from a reliable source
7	Transcript of Tesla, Inc.’s earnings conference call for the fourth quarter of 2018, held on January 30, 2019	¶ 271 Issue No. 21; publicly available from a reliable source

II. FACTUAL BASIS

In connection with the Tesla Defendants’ Motion, the Court “must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,

¹ “¶” refers to the paragraph(s) of the Third Supplemental & Amended Complaint (“TAC”), ECF No. 103, that quote from, or refer to information contained in, the referenced exhibit.

551 U.S. 308, 322 (2007). Courts may take judicial notice of documents both for their contents and for the truth of the matters asserted therein when the facts are not in dispute and are from reliable sources. *See Smilovits v. First Solar Inc.*, 119 F. Supp. 3d 978, 1010 (D. Ariz. 2015), *aff'd sub nom. Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750 (9th Cir. 2018). The Tesla Defendants' exhibits—public statements made by Defendants and documents and tweets posted by and to Plaintiff through the Twitter handle of his online “legal information service,” known as PlainSite—are all incorporated by reference into the TAC and/or are the proper subject of judicial notice.

A. The Court May Consider Exhibits 6 and 7 as Incorporated by Reference into the TAC.

Incorporation by reference is a judicially-created doctrine that treats certain documents as though they are part of the complaint itself. *Jones v. Micron Tech. Inc.*, 400 F. Supp. 3d 897, 905 (N.D. Cal. 2019). A document may be incorporated by reference into a complaint “if the plaintiff refers extensively to the document *or* the document forms the basis of the plaintiff’s claim.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (emphasis added) (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). Considering these documents in their entirety is crucial “to prevent plaintiffs from highlighting only the portions of certain documents that support their claims, while omitting portions of those documents that weaken their claims.” *Jones*, 400 F. Supp. 3d at 905.

Exhibits 6 and 7 are publicly-available transcripts of remarks made by Mr. Musk and others at an investor and analyst event held on April 22, 2019, and an earnings call held on January 30, 2019, respectively. Reddy Decl. ¶¶ 8, 9. Plaintiff challenges as fraudulent statements made by Mr. Musk during these events. However, Plaintiff misleadingly supports his allegations by selectively quoting those statements and omitting relevant cautionary language. *See* ¶ 271, Issue Nos. 21, 23. Not only do these exhibits “form[] the basis of [P]laintiff’s claim[s]” such that they are properly incorporated by reference, *In re Apple Inc. Sec. Litig.*, No. 19-cv-02033, 2020 WL 2857397, at *5 (N.D. Cal. June 2, 2020), the Court must consider these exhibits in evaluating Plaintiff’s claim because the alleged misstatement “must be analyzed in context.” *In re Stac Elecs.*

1 *Sec. Litig.*, 89 F.3d 1399, 1408, 1406 & n.4 (9th Cir. 1996). Indeed, the Private Securities Litigation
 2 Reform Act (“PSLRA”) mandates these exhibits’ incorporation by reference because they contain
 3 cautionary language on which the Tesla Defendants’ challenge to the alleged falsity of certain
 4 forward-looking statements is partially based. *See* 15 U.S.C. § 78u-5(e) (“On any motion to dismiss
 5 based upon [the safe harbor of the PSLRA], the court *shall* consider any statement cited in the
 6 complaint and any cautionary statement accompanying the forward-looking statement, which are
 7 not subject to material dispute, cited by the defendant.” (emphasis added)).

8 **B. The Court May Take Judicial Notice of Exhibits 1-7 As Publicly Available**
 9 **Information from Reliable Sources.**

10 Federal Rule of Evidence 201 authorizes a court to take judicial notice of facts that “are not
 11 subject to reasonable dispute” because they “can be accurately and readily determined from sources
 12 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). As discussed above,
 13 a court may take judicial notice of the truth of the matters asserted in judicially noticeable
 14 documents when the facts are not in dispute and are from reliable sources, *see Smilovits*, 119 F.
 15 Supp. 3d at 1010. The Tesla Defendants seek notice of these exhibits for a far more limited purpose:
 16 to “indicate what was in the public realm at the time, not [to show] whether the contents of those
 17 [documents] were in fact true,” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d
 18 954, 960 (9th Cir. 2010) (citation omitted). Courts resolving federal securities claims routinely
 19 take judicial notice of conference transcripts, news articles, and other public information for
 20 precisely this purpose. *In re Apple Inc. Sec. Litig.*, 2020 WL 2857397, at *6.

21 **“Reality Check” Report (Exhibit 1).** News reports and articles are proper subjects of
 22 judicial notice to show that the market was aware of information contained therein. *See, e.g., Von*
 23 *Saher*, 592 F.3d at 960 (taking judicial notice of “various newspapers, magazines, and books”);
 24 *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999) (“We take judicial
 25 notice that the market was aware of the information contained in news articles submitted by the
 26 defendants.”); *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*,
 27 No. 12-cv-06039, 2013 WL 6441843, at *5 (N.D. Cal. Dec. 9, 2013) (taking judicial notice of
 28 analyst reports). Exhibit 1 is an online report regarding the Tesla Defendants that was authored by

1 Plaintiff. *See* Reddy Decl. ¶ 3. This publication is available for public viewing and download on
 2 Plaintiff’s website, and as shown in the highlighted text of this exhibit, it contains many of the same
 3 allegations in the TAC. *Id.*; Ex 1. The Court may therefore take judicial notice of the article “to
 4 establish whether and when certain information was provided to the market” or otherwise known
 5 to Plaintiff. *In re Energy Recovery Inc. Sec. Litig.*, No. 15-cv-00265, 2016 WL 324150, at *3 (N.D.
 6 Cal. Jan. 27, 2016) (citation and internal quotations marks omitted).

7 **Investor Event Transcripts (Exhibits 6 and 7).** The transcripts of Tesla’s Analyst /
 8 Investor Day and earnings call for the fourth quarter of 2018, discussed above, are judicially
 9 noticeable as well as being incorporated by reference into the TAC. *See supra* at 3-4. Courts
 10 routinely take judicial notice of transcripts of public investor events in securities cases. *In re Nimble*
 11 *Storage, Inc.*, No. 15-cv-05803, 2016 WL 7209826, at *1 (N.D. Cal. Dec. 9, 2016) (commenting
 12 on noticeability of “transcripts of earnings conference calls and investor forums” (citation
 13 omitted)).

14 **Publicly-Available Tweets (Exhibits 2, 3 and 4).** The Court should take judicial notice of
 15 these exhibits, which are tweets relating to Plaintiff’s libel claims and his securities fraud
 16 allegations. Courts in this district and elsewhere in the Ninth Circuit have found that tweets are
 17 appropriate subjects of judicial notice where—as here—they are publicly available and their
 18 accuracy may not reasonably be questioned. *Unsworth v. Musk*, No. 19-MC-80224, 2019 WL
 19 5550060, at *4 (N.D. Cal. Oct. 28, 2019) (“[J]udicial notice is proper because the existence of the
 20 publicly-available . . . tweets cannot reasonably be questioned.”); *Alexander v. Metro-Goldwyn-*
 21 *Mayer Studios Inc.*, No. CV 17-3123, 2017 WL 5633407, at *3 (C.D. Cal. Aug. 14, 2017) (taking
 22 judicial notice of “screenshots of Dwayne Johnson and [Sylvester] Stallone’s Twitter accounts”
 23 because “they can be accurately and readily determined from sources whose accuracy cannot
 24 reasonably be questioned”).

25 **Publicly-Available Correspondence (Exhibit 5).** Exhibit 5 is an email from Plaintiff to
 26 Mr. Musk. As with the other exhibits that are the subject of this motion, the Tesla Defendants seek
 27 judicial notice of this correspondence only to show Plaintiff’s knowledge and what information
 28 was publicly available to the market, and not for the truth of the matters asserted therein.

This document is judicially noticeable because Plaintiff rendered the fact of the document's existence and its contents publicly available and not subject to reasonable dispute. *See Wilson v. Frito-Lay N. Am., Inc.*, 260 F. Supp. 3d 1202, 1206-07 (N.D. Cal. 2017) (taking judicial notice of letter sent to government agency and subsequently posted online); *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005) (taking judicial notice of pages from medical association's website and an Amazon.com product). Specifically, Plaintiff posted the document to his website, plainsite.org. *See* Reddy Decl. ¶ 7; Email Conversation Between PlainSite Founder Aaron Greenspan and Tesla CEO Elon Musk, PlainSite (Aug. 8, 2019), *available at* <https://www.plainsite.org/documents/hwau8/email-conversation-between-plainsite-founder-aaron-greenspan-and-tesla-ceo-elon-musk/>. Accordingly, judicial notice is proper for this document as well.

III. CONCLUSION

For the reasons set forth above, the Tesla Defendants respectfully request that the Court incorporate by reference and/or take judicial notice of Exhibits 1-7.

Dated: March 12, 2021

COOLEY LLP

By: /s/ Aarti Reddy

Aarti Reddy

Attorneys for Defendants
TESLA, INC. and ELON MUSK

246659547